

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NUMBER 748 OF 2015

(BEING CRIMINAL CASE NUMBER 149 OF 2015 BEFORE THE FGM COURT SITTING AT BLANTYRE)

BETWEEN:

THE REPUBLIC

AND

WILLIAS DAUDI

DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Mtonga, Counself for the State

Maele, Counsel for the defendant

Chanonga, Official Court Interpreter

ORDER

This is the decision of this Court following the defendant's application for bail pending a review of the lower Court's decision pursuant to section 15 (1) of the Criminal Procedure and Evidence Code and section 42 (2)(2)(f)(viii) of the Constitution which provides that a review of criminal cases is a human right for convicted persons.



The defendant was charged with the offence of robbery which is contrary to section 301 of the Penal Code. He was convicted after a full trial and was sentenced to nine years' imprisonment.

The defendant seeks that he be released on bail pending the review on the ground that the review is very likely to be successful.

One of the grounds for seeking the review substantially relates to the application of the Constitution, particularly in that, the applicant was not given legal representation at the expense of the State. The offence of robbery attracts a maximum punishment of fourteen years except that when more than one person is involved or a dangerous weapon is used or the accused strikes the victim the maximum sentence is death or life imprisonment,

The record shows that the defendant herein was in the company of others and was amenable to the maximum punishment of death or life imprisonment.

The defendant contends that he was unjustifiably discriminated against, and not treated with equality under the law, when one considers that all accused persons charged with murder or manslaughter are given legal representation by the State as a matter of Government policy. The defendant contended that he was not given legal representation, yet persons accused of murder which carries a similar maximum sentence are given legal representation at the State's expense. Further that persons accused of manslaughter, whose maximum sentence is less than death, are also given legal representation at the expense of the State.

This Court notes that, according to section 210 of the Penal Code, the maximum punishment for murder is death or life imprisonment. Further that, according to section 211 of the Penal Code, the maximum punishment for manslaughter is life imprisonment.

The defendant charged that the conduct of the State is contrary to the provisions of section 20 of the Constitution and section 42 (2)(f)(v) of the Constitution.

This Court has considered Section 20 of the Constitution provides that

(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on

grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.

(2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

Section 42 (2)(f)(v) of the Constitution provides that

Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right—

as an accused person, to a fair trial, which shall include the right—

to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights.

The defendant contends that he should have been given legal representation at the expense of the State considering that he was charged with a serious offence similar, in terms of the maximum punishment, to that of murder or manslaughter for which such legal representation is freely given by the State.

The defendant indicated that this is a matter that is fit for determination by this Court constituting not less than three Judges and sitting in a matter that substantially relates to the application of the Constitution in terms of section 9 (2) of the Courts Act. Section 9 (2) of the Courts Act provides that

Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.

This Court also considered the argument by the State that the defendant should have proceeded by way of judicial review since the defendant is seeking to challenge an executive decision by the Legal Aid Bureau to represent all persons accused of murder or manslaughter and not those accused of robbery as the accused herein.

After long and careful reflection this Court has arrived at the conclusion that this matter has been properly raised in the context of the criminal review since the rights


of the defendant herein are properly implicated in the criminal process. This is notwithstanding that judicial review is also available. The criminal review process is an alternative to the judicial review. Judicial review cannot therefore preclude criminal review.

In the premises, this Court has considered the argument, among others, that this matter ought to be determined by three Judges in line with section 9 (2) of the Courts Act and agrees that such should be the case. There is, in the view of this Court, a question fit for determination by the three Judges and the question substantively relates to the application of provisions of the Constitution namely sections 20 and 42 (2)(f)(v) of the Constitution in the context of the alleged discrimination of the accused person vis-à-vis provision of legal representation depending on the status of the accused person in terms of the offence charged. The offences implicated are those of robbery on one hand and murder or manslaughter on the other hand. The three judges have to determine whether there is constitutionally sound justification for the discriminatory policy of the Government of affording the right to legal representation at the State's expense to all persons accused of murder or manslaughter and not to those accused of robbery when actually all these three offences attract the maximum punishment of death or life imprisonment.

In the premises, this Court will not decide on the question of bail pending review for the accused person who is serving a sentence of nine years' imprisonment but shall leave that question and all the matters to be dealt with by the three judges in the circumstances.

This matter is therefore referred to the Chief Justice for certification for consideration by the three judges under the relevant Rules.

Made in chambers at Blantyre this 28th October 2016.



M.A. Tembo
JUDGE